



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS-R5-ES-2013-0035]**

**[FXES11130900000C6-134-FF09E30000]**

**RIN 1018-AZ31**

### **Endangered and Threatened Wildlife and Plants; Reinstatement of Removal of the Virginia Northern Flying Squirrel From the List of Endangered and Threatened Wildlife**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are issuing this final rule to comply with a court order that has the effect of reinstating the removal of the

Virginia northern flying squirrel (*Glaucomys sabrinus fuscus*) from the List of Endangered and Threatened Wildlife under the Endangered Species Act of 1973 (ESA), as amended. Pursuant to the District of Columbia District Court of Appeals order dated August 17, 2012, and mandate dated November 13, 2012, this rule again removes the Virginia northern flying squirrel from the List of Endangered and Threatened Wildlife.

**DATES:** This action is effective [insert date of publication in the **FEDERAL REGISTER**].

**ADDRESSES:** This final rule is available on the Internet at <http://www.regulations.gov>. It will also be available for inspection, by appointment, during normal business hours at U.S. Fish and Wildlife Service, West Virginia Field Office, 694 Beverly Pike, Elkins, West Virginia 26241. Call (304) 636–6586 to make arrangements.

**FOR FURTHER INFORMATION CONTACT:** Deborah Carter, Project Leader, at our West Virginia field office (see **ADDRESSES**) or telephone (304) 636–6586, extension 12. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 1–800–877–8337 for TTY assistance.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On August 26, 2008, we published a final rule to remove ESA protections for the Virginia northern flying squirrel, more commonly known as the West Virginia northern flying squirrel (WVNFS) (73 FR 50226). Additional background information on the WVNFS, including previous Federal actions, can be found in our August 26, 2008, final rule, <http://www.regulations.gov> in Docket No. FWS–R5–ES–2011–0035, or at <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?scode=A09R>.

A lawsuit challenging our final rule was filed in U.S. District Court for the District of Columbia. On March 25, 2011, the U.S. District Court for the District of Columbia vacated and set aside our 2008 delisting rule (*Friends of Blackwater, et al. v. Salazar, et al.*, 772 F.Supp. 2d 232 (D.D.C. 2011)). On May 20, 2011, the Department of Justice on behalf of the Service appealed the District Court's decision to the U.S. Court of Appeals for the District of Columbia Circuit. Pending the appeal, and consistent with the District Court's March 25, 2011, order, we published a final rule reinstating ESA protections for the WVNFS (76 FR 35349, June 17, 2011).

On August 17, 2012, the U.S. Court of Appeals, in a two-to-one opinion, reversed the ruling of the U.S. District Court (*Friends of Blackwater, et al. v. Salazar, et al.*, 691 F.3d 428 (D.C. Cir. 2012)). On September 28, 2012, *Friends of Blackwater et al.* petitioned the U.S. Court of Appeals for a rehearing and a rehearing en banc, which were both denied on November 1, 2012 (*Friends of Blackwater, et al. v. Salazar, et al.*, D.C. Cir., No: 11–5128). On November 13, 2012, the U.S. Court of Appeals issued its

mandate consistent with its August 17, 2012, opinion reversing the U.S. District Court's vacatur of the WVNFS delisting rule. On January 30, 2013, Friends of Blackwater *et al.*'s time to file a petition for a writ of certiorari with the U.S. Supreme Court expired.

### **Administrative Procedure**

This rulemaking is necessary to comply with the August 17, 2012, court order and November 13, 2012, mandate. Therefore, under these circumstances, the Director has determined, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and opportunity for public comment are impractical and unnecessary. The Director has further determined, pursuant to 5 U.S.C. 553(d)(3), that the agency has good cause to make this rule effective upon publication.

### **Effects of the Rule**

As of the publication of this rule, the WVNFS is again removed from the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h). Therefore, this species will no longer receive Federal protection under the ESA. This rule will not affect the status of the WVNFS under State law or suspend any other legal protections provided by State law.

### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### **Regulation Promulgation**

To comply with the court order and mandate discussed above, we amend part 17, subchapter B of chapter I, title 50 of the CFR, as set forth below:

#### **PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

2. Amend § 17.11(h) by removing the entry for “Squirrel, Virginia northern flying” under “MAMMALS” from the List of Endangered and Threatened Wildlife.

Dated: February 25, 2013

Signed: Rowan W. Gould

Deputy Director, Fish and Wildlife Service

**Billing Code: 4310-55-P**

[FR Doc. 2013-04932 Filed 03/01/2013 at 8:45 am; Publication Date: 03/04/2013]